FCC 99-141

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc., Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
Implementation and Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF MICHIGAN COMMUNITIES REGARDING NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

I. INTRODUCTION AND SUMMARY

On June 10, 1999, the same day the Commission adopted the Notice of Rulemaking and Notice of Inquiry in this proceeding, the construction of a fiber optic telecommunications network in southeastern Michigan was the lead story on local television news programs, 24-hour talk radio shows and front page newspaper headlines.

Just three days earlier, an underground boring crew from Corby Energy Services of Taylor, Michigan, which had been hired by MCI WorldCom, Inc., to relocate fiber optic lines so a new freeway exit ramp could be constructed, punctured a 42-inch Detroit Water and Sewerage Department water main, causing more than 100,000 residents and 300 businesses to lose their water supply. Businesses from corner stores to the DaimlerChrysler World Headquarters, schools and Oakland University were forced to close. Water service was not restored for four days. Residents had to boil tap water for several more days to guard against contamination.

On June 10, 1999, following a hurried investigation, City Manager William Ross of the City of Auburn Hills, Michigan, announced that Corby had failed to get construction permits from the City. Recently, in a newspaper report on August 30, 1999, Ross reported that a full police investigation confirmed that Corby had failed to obtain city permits for the work despite the fact that the digging crossed into the city's public rights-of-way along Squirrel Road. Corby and MCI WorldCom claim the work was covered by a permit obtained from the State Department of Transportation. Copies of some of the newspaper articles are attached as Exhibits 1-3.

The Commission's Notice of Inquiry points out that "[p]ublic rights of way generally are controlled and managed by local government and, to a lesser extent, state governments. ensuring that the rights-of-way are used in a manner that benefits the public and, which does not threaten public safety, unnecessarily inconvenience the public, or impose uncompensated costs." Therefore, the Commission said it was seeking comment from local governments "regarding their rights-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experiences."

The Cities of Brighton, Fraser, Lincoln Park, Madison Heights, St. Clair, Sterling Heights, Troy, Wayne and the Township of Raisin file these reply comments to report on their experiences and the experiences of neighboring communities in southeastern Michigan with the management of rights-of-way and the collection of construction permit, right-of-way usage and/or franchise fees from providers of telecommunications services, including cable television operators which are leasing excess capacity to telecommunications companies and to other cable operators, raising important legal and regulatory issues for federal, state and local governments.

II. CONSTRUCTION IN THE PUBLIC RIGHTS-OF-WAY

The sovereign power of the State of Michigan to grant public utility franchises is delegated to local government by Article VII, Section 29 of the Michigan Constitution of 1963, which was derived from Article VIII, Section 28 of the State's 1908 Constitution. Section 29 bars public utility companies from using public rights-of-way for the installation of wires, poles, pipes, tracks, conduits or other facilities without municipal consent and

forbids the transaction of local business without a municipal franchise. Under Section 29, gas, electric, water, street railways and telephone companies, among others, are properly regulated as public utilities by local governments. Specifically mentioned as subject to municipal franchising during the debates on the 1908 Michigan Constitution, were telegraph and telephone companies. *Proceedings and Debates on the 1908 Constitution of the State of Michigan* 1333-1334 (1908).

Telecommunications companies are authorized by Act No. 368 of the Public Acts of 1925, as amended, Mich. Comp. Laws. Ann. §247.183 ("Act. No. 368") to use the "highways, streets, alleys and public places" for the installation of lines and other facilities subject to obtaining municipal consent. 1957-58 Op. Atty. Gen. 110,111 (March 13, 1957) This only allows telecommunications companies to string lines *through* a community, not to offer local service.

A telecommunications company cannot use them to offer service without further obtaining a locally negotiated franchise. 2 Op. Atty. Gen. 89 (March 17, 1958). In 1995, while closely watching development of the U.S. Telecommunications Act of 1996 in the U.S. Congress, the State Legislature amended the Michigan Telecommunications Act in an attempt to replace municipal franchising with a streamlined and much more straightforward permit procedure. Act No. 179 of the Public Acts of 1991, as amended, Mich. Comp. Laws Ann. §484.2101, *et. seq.* [1]

Until 1995, cities, townships and villages paid little attention to construction in the public rights-of-way, which consists of a patchwork quilt of state, county and local laws and regulations. For example, in 1995, Metropolitan Fiber Systems ("MFS") began building a fiber optic loop in southeastern Michigan. A significant portion of the network extends north from the City of Detroit through a 12-mile long industrial corridor along Van Dyke Avenue through the Cities of Center Line, Warren and Sterling Heights which house automotive plants and the General Motors Technical Center. MCI obtained a Michigan State Department of Transportation permit for its installations along Van Dyke Avenue, a state highway, but failed to secure any permits from the municipalities it has passing through. It is indeed amazing that in August, 1995 one of MFS's subcontractors actually dug up a corner of the front lawn of the Warren City Hall in making its installation without ever requesting the city's permission beforehand.

City officials in Sterling Heights were tipped off to the right-of-way work by the sudden appearance of a 4-foot tall, two-inch around orange-colored plastic pipe in the Van

---

[1]. The state law has been under attack by some Michigan municipalities as an unconstitutional derogation of municipal franchising authority. *TCG Detroit v. City of Dearborn*, Wayne County Circuit Court Case No. 98-803937-CK (March 8, 1999). In its Opinion, the Court rejected the City's constitutional challenge to portions of the Michigan Telecommunications Act under article VII, section 29 of the State Constitution.

Dyke median just south of Metropolitan Parkway, warning future diggers that MFS had installed a fiber optic line underground at that location, crossing Van Dyke Avenue east to west following lines of utility poles. Both Warren and Sterling Heights were forced into expensive and time-consuming state court litigation with MFS over its subsequent refusal to obtain local approval for the extensive overhead and underground construction it completed within the public rights-of-way. In both cases, MFS eventually agreed to settlements with both communities by entering into telecommunications permit agreements with the two cities, authorizing the construction and operation of the telecommunications system. (Exhibits 4-5).

During the same time period, MCImetro Access Transmission Services, Inc. (a competitor since merged with MFS into MCIWorldCom, Inc.), sat down with city officials in Warren and Sterling Heights, and negotiated terms of telecommunications permits for an installation it wanted to make along Van Dyke Avenue. The Sterling MCImetro Agreement is attached as Exhibit 6.

In Sterling Heights, city officials were prompted to thoroughly review and update its ordinances, fee schedules and administrative procedures regarding construction in the public rights-of-way, separate and apart from adopting a new ordinance regulating the granting of telecommunication permits authorizing companies (1) to use the public rights-of-way for the installation of wires and other facilities under Act No, 368 of the Public Acts of 1925, and (2) to offer telecommunications services to customers in the City. Copies of the two ordinances, the Sterling Heights Public Streets and Rights-of-Way Ordinance and its Telecommunications Ordinance, are attached as Exhibits 7 & 8.

These experiences demonstrated clearly that "[l]ocal government must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage . . . facilities" in the rights-of-way, including such "activities as "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them" [2] regardless of whether the utility involved is (1) a publicly-owned water, sanitary sewer or storm drain pipe or (2) a private company's electric line, natural gas pipe, cable television or telecommunication fiber optic cable. In neighboring Troy, which spawned the FCC's ruling in TCI Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, FCC 97-331 (rel. Sept. 19, 1997) (TCI), *recon. denied*, FCC 98-216 (rel. Sept. 4, 1998), the City responded to requests from multiple providers of telecommunications services in 1995 by, first, updating its right-of-way construction plan review and permitting ordinance (Exhibit 9) and, second, adopting a new Telecommunications Ordinance which became the subject of considerable debate in the TCI proceeding.

---

[2]. Id. at Paragraph 105.

(Exhibit 10) The telecommunications ordinance challenged in the TCI case was adopted in December 1995 following enactment of the Michigan Telecommunications Act of 1995 but before President Clinton signed into law the U.S. Telecommunication Act of 1996. Consequently, certain parts of the ordinance's provisions criticized by the FCC were adopted without the benefit of the thorough review given to it in the TCI case under terms of the 1996 Act.

However, the City of Troy has since re-examined its telecommunication ordinance and repealed certain sections specifically mentioned in the FCC's lengthy opinion as outside the purview of local government, "reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications services is offered to the public."[3] As part of that review, the City repealed sections of the ordinance, "that, among other things, require franchisees to interconnect with other telecommunications systems in the City for purpose of facilitating universal service, provide for the regulation of . . . interconnection and mandate 'most favored nation' treatment for the City under which a franchisee providing a new service, facility, equipment, fee or grant to any other community within the State of Michigan."[4] A copy of the amended Troy Telecommunications Ordinance is attached as Exhibit 11.

The Cities of Brighton, Madison Heights and St. Clair, Michigan have also adopted comprehensive right-of-way ordinances which apply to all users, not just telecommunications companies.

III. FAIR AND REASONABLE COMPENSATION FOR USE OF PUBLIC RIGHT-OF-WAY

In its TCI ruling, the Commission said "[a]n especially troubling issue alluded to in the record concerns the discriminatory application of telecommunications regulations . . . Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory." [5] The City of Troy is mindful of the Commission's observations and, since 1995, has evenly applied its rights-of-way construction ordinance to Ameritech, the incumbent LEC, and CLECs, including Metropolitan Fiber Systems, Ameritech Communications, Inc., TCG Detroit and McLeodUSA.

Michigan law, however, prohibits the City of Troy from revisiting the authority of

---

[3]. Id. at Paragraph 105.

[4]. Id.

[5]. Id. at Paragraphs 107-108.

Ameritech to operate in the public rights-of-way and, consequently, negotiating from Ameritech a franchise fee equal to that being paid under the City's Telecommunications Ordinance, an issue which was raised, argued and squarely decided in favor of Ameritech in litigation between TCG Detroit and the City of Dearborn in the U.S. District Court for the Eastern District of Michigan, Southern Division, by Chief Judge Lawrence J. Zatkoff. He said:

> ". . . Ameritech was granted a statewide franchise to operate its telecommunications system. Under the act which Ameritech is organized ... the City of Dearborn may manage its public rights-of-way, but, as it relates to Ameritech, only to protect the health, welfare and safety of the public. . . But it may not seek to impose franchise fees. . . . "

TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 794 (1998). The Court went on to rule that "Dearborn cannot require Ameritech to enter into a franchise agreement and its ordinance is inapplicable to it." Id. at 796-797. The Court specifically rejected arguments made by TCG Detroit that this was not competitively neutral and nondiscriminatory. The Opinion said:

> In fact, the position that TCG is advocating – exact parity – was specifically considered and rejected, by Congress in drafting the Act.
>
> During the drafting of the Act, Representative Dan Schaefer attempted to include a "parity provision" in the Act. The parity provision would have required that any fees or charges imposed by a city upon a telecommunications provider for use of the local rights-of-way would have to be exactly equal, regardless of the extent to which one provider needed to impose on the rights-of-way as compared to another. 141 CONG. REC. H 8427 (August 5, 1995). This provision was flatly rejected by the Stupak-Barton amendment. In offering his amendment to replace the manager's amendment, which included the parity provision, authorized by Representative Stupak who stated:
>
> > [L]ocal Governments must be able to distinguish between different telecommunications providers. The way the manager's amendment is right now, they cannot make that distinction.
> >
> > For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.
> >
> > The manager's amendment says that local government would

> have to charge the same fee to every company regardless of how much or how little they use the right-of-way or rip up our streets . . . . [rather] the companies should have to pay a fair and reasonable rate to use the public property.

Id. at H 8460. The Stupak-Barton amendment was adopted in place of the parity provision. As can clearly be seen from Representative Stupak's comments, the parity provision was defeated because it did not allow a local government to distinguish between providers based on use of the right-of-way.

> . . . . The legislative history clearly allows the City to account for the differences between providers and it is enough that the City imposes (or plans to impose) comparable burdens. Accordingly, the Court finds no support for TCG's claim that the City, by imposing comparable but not identical agreements, is, or will be, discriminating against it in violation of §253(c).

Id. at. 792. Accordingly, the City of Troy has not moved to require Ameritech to obtain a telecommunications permit under its Telecommunications Ordinance or the Michigan Telecommunications Act because such requirements are unenforceable against Ameritech. Therefore, the Commission should use this opportunity to clarify the statements it made in its TCI ruling at Paragraphs 107 and 108 in this regard.

IV. REVISITING BRIEFLY TCI'S UNDECIDED BIG ISSUE

The Commission refused to rule on the principal claims made by TCI against Troy's Telecommunications Ordinance that it presented a barrier to entry by the cable operator into the telecommunication business and that it exceeded the city's authority to manage the public rights-of-way and obtain fair and reasonable compensation under section 253(c). In summary, the declaratory ruling:

- Found that Troy violated section 621(b)(3)(B) of the Act by placing a telecommunications condition on its grant of construction permits needed by TCI to upgrade its cable system. The Commission did not accept municipal arguments that Section 621(b)(3)(B) was intended only to bar municipal officials from bootstrapping their franchising of cable television into franchising of telecommunications.

- Disagreed with TCI that Troy's actions violated section 621(b)(3)(A) of the Act because TCI was not itself engaged in providing telecommunications services in the City.

- Ruled that TCI failed to demonstrate any violation of section 621(b)(3)(d) because TCI did not allege or show that the city had required TCI to provide any

telecommunications services. However, TGC Detroit was engaged in providing telecommunication services over a significant portion of the TCI cable system in the City.

- Decided that the City had not violated section 624(e) by prohibiting, conditioning or restricting TCI in using any particular subscriber equipment or transmission technology involving cable television.

- Noted its concern that Troy and other municipalities may be discouraging the development of competitive telecommunications markets by adopting regulations extending beyond the limits of municipal authority to manage the public rights-of-way.

There has been little scholarly writing analyzing the decision in TCI since the Commission did not decide the major issues raised by Section 621 of the U.S. Telecommunications Act of 1996, 47 U.S.C. 541(b)(3)(A), (B) and (D). Cable television's entry into the telecommunications business today as a provider of cable modem service, telephone service and as a lessor of fiber optic capacity to CLECs makes it worth taking another close look at how the Commission summarized in Paragraphs 45-49 of its Opinion and Order the cable industry argument in light of the remarkable series of telecommunications and cable television industry mergers since then and the technological convergence underway. For example, the TCI system in Troy is now owned by AT&T, which also owns TCG Detroit, which uses approximately 14 miles of fiber originally installed by TCI and leased to TCG Detroit.

In the TCI case, the Commission said the industry's position was that "no franchise is required when an incumbent cable operator seeks to provide telecommunications service because . . . (i) the local government already regulates the cable operator's use of the public rights-of-way though the cable franchise and (ii) apart from overseeing the physical use of the rights-of-way, local governments have no authority to regulate telecommunications service." TCI at ¶ 48. As Cox states:

> "If a city has authorized, or is willing to authorize, the use of public rights-of-way for deployment of facilities for the provision of cable service pursuant to Title VI, there is no legitimate reason for it to require additional permission for the provision of telecommunications service over those facilities unless the provision of such service somehow raises new problems of safety, interference, disruption or aesthetics relating to rights-of-way management that are not dealt with by the cable franchise."

The Commission declined the opportunity to issue a definitive ruling. However, it did make a policy pronouncement which some cable industry officials have interpreted as a warning to municipalities:

> "We . . . note that the administration of the public rights-of-way should

not be used to undermine the efforts of either cable or telecommunications providers to either upgrade or build new facilities to provide a broad array of new communications services. The City itself appears to have recognized that fiber optic facilities are important to the future communications network, but its actions with respect to attempts of certain providers to install these facilities in the public rights-of-way have been less than welcoming. Upgrades of existing copper and coaxial cable plants are necessary today for the delivery of high quality cable services, are required for the provision of tomorrow's competitive local telephone service, and are essential for the future provision of switched, integrated broadband voice, video and data services. All levels of government can best serve the public interest by joining together to speed the accomplishment of the sorts of cable upgrades TCI seeks to make in Troy by streamlining and hastening administrative processes." Id. at 78.

It is not surprising that the Commission used the case to scold municipal officials for allegedly failing to adhere to the federal view of the greater public interest. The cable industry had invested a tremendous amount of time and money in a losing effort, doomed, perhaps, from the beginning by TCI's stubborn refusal to admit that it was already using the cable system to deliver telecommunications services to customers and by subleasing excess capacity to TCG Detroit. You have to wonder why TCI refused to admit such a crucial fact. TCI's legal strategists seemed to think that they should win the case only by simply pointing out that Ameritech New Media, Inc., wholly-owned subsidiary of the regional Bell operating company, was overbuilding TCI with a new hybrid coaxial/fiber optic 750 MHz cable television system.

Actually, elected officials in Troy and elsewhere do share the Commission's opinion that the building of a national, switched, integrated broadband network offering voice, video and data services is in the national interest. However, that does not mean they intend to forego local regulation of cable television, telecommunications companies and others who want to string wires on poles and dig up public rights-of-way. Municipal officials in Troy and elsewhere argue that rights-of-way management depends on local participation in system planning and construction decisions.

First, TCI and other cable operators which are upgrading and rebuilding cable television systems and installing excess capacity for the provision of future voice and data services without advising municipal officials, are shortchanging themselves and their customers by denying the general public any role in fashioning the present and future capabilities of the neighborhood system.

Second, public confidence in the cable television industry is being seriously undermined by adopting national policies which encourage them to make unilateral, secret decisions about how, when, where, what and why they make system upgrade and rebuild decisions. Such major decisions should not be made without local government public input. That is why state constitutions and statutes across the country specifically preserve

municipal as opposed to state control of streets, sidewalks and other public places.

Moreover, the Commission had it backwards when it decided that the City of Troy "may not place a condition related to the cable operator's provision of telecommunications service in a cable permit *issued pursuant to Title VI cable franchising authority.*" What TCI was seeking was a construction permit. In Michigan and elsewhere, right-of-way construction permits are not issued under Title VI of the U.S. Communications Act of 1934.

Indeed, as pointed out earlier, cable franchises themselves, are issued under state law but subject to Title VI. As discussed earlier, Troy and most other communities also require permits for overhead and, especially, underground construction activity in the public rights-of-way whether the company involved is installing gas pipelines, electric poles and wires, cable television cables or telephone lines. This construction permit process is completely separate from cable television franchising, and from any other local government approval required to engage in providing telecommunications services. The municipal franchising of cable television and telecommunications systems arises in Michigan and most other states under state constitutional and statutory provisions which are not derived from the U.S. Cable Communications Policy Act of 1984. The federal law requiring cable operators to obtain a franchise adopted by the U.S. Congress in 1984 added nothing new to the authority of municipalities in Michigan regarding either rights-of-way construction permits or cable franchises. Accordingly, neither right-of-way construction permits nor franchises need by cable companies in Michigan are not issued "pursuant to Title VI cable franchising authority."

Third, the process of reviewing construction permits depends to some important extent on the accuracy and completeness of the applications and drawings. The public rights-of-way construction permit process serves as a critical first step in the local regulatory procedure, protecting the facilities of existing users of the public rights-of-way but also by notifying city officials of new competitors seeking entry into the local telecommunications market. In Troy, for example, as pointed out earlier, city officials updated its construction permit ordinance before drawing up the telecommunications ordinance which drew fire from TCI. Surely, municipal officials can and should request in an application for a construction permit whether a cable operator is installing excess capacity -- adding, for example, in some cases, hundreds of extra fibers to cables being installed in public rights-of-way. The Commission's earlier decision in TCI cannot properly be interpreted as preempting such a basic inquiry and the Commission should take this opportunity to clarify its ruling.

Furthermore, if municipal officials discover plans for excess capacity in an application to upgrade or rebuild a cable television system, they should be allowed to investigate and, in the appropriate case to deny the request. What the Commission did in its very narrow ruling was to decide that the issuance of a permit to upgrade a cable television system cannot be denied because the cable operator refuses to agree to conditions relating to use of the cable system to provide telecommunications services. The Commission should explaint that the ruling does not mean a permit to install hundreds of

extra fibers in a cable system upgrade must nonetheless be granted.

The Commission also mentioned that the Section 253(c) authority of municipal officials to manage the public rights-of-way is particularly narrow in its view, allowing them "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of various systems using the public rights-of-way to prevent interference between them." These are the traditional requirements for obtaining overhead and underground construction permits -- not telecommunications franchises or permits. The Commission's approach constricts traditional franchising to move construction permitting and inspection puts municipal officials espousing franchising on a collision course with the entire telecommunications industry, not just cable operators trying to leverage existing cable franchises to enter the telephone business through the backdoor.

Finally, in the TCI case, the Commission refused to decide whether it had jurisdiction under Section 253(d) to preempt the actions taken by Troy under Section 253(c), the subject of a motion to dismiss filed early in the case by two groups of cities, saying "we leave that important issue for another day." This makes it appear as though the Commission simply stretched itself to make a decision under Section 621(b)(3)(B) to avoid a delicate jurisdictional issue. However, the Commission did issue a warning to officials in cities, township or villages where the incumbent telephone company pays no franchise fees in Michigan, for example. Ameritech pays no local franchise fees in Troy or anywhere else in the state under a statewide grant of authority to operate a telephone company using the public rights-of-way obtained under state law in the late 1800s. The Commission said:

> "One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory."

Id. at 108. In the TCG Detroit case, the U.S. District Court in Michigan decided that there was a rational basis for distinguishing between an incumbent telephone company such as Ameritech, which delivers universal telephone service, and, for example, a new entrant such as MCImetro Excess Transmission Services, Inc., which was proposed to string fiber optic cables through Troy, offering service to a select high-demand commercial customer, DaimlerChrysler, without even having any offices within the City. It will be much more difficult to draw a legal distinction between Ameritech and AT&T, which now owns the TCI system in Troy, if AT&T decides to start offering local residential telephone service city wide. However, the TCG Detroit decision was that it's permissible to collect fees from MCI's service to big customers even though similar fees aren't charged to Ameritech which serves everybody. The courts having sided with local government on the issue, the 253(d) jurisdictional issue and the Commission's warning no longer seem relevant.

The FCC concluded its Opinion and Order noting that:

> "[G]overnments that have historically refrained from engaging in substantive telecommunications regulation should not view new entrants as being more susceptible to regulation than the incumbents. These efforts would go a long way in hastening the arrival of local telephone competition of many varieties, and in particular, of facilities-based local competition.
>
> Finally, we note that interpreting the 1996 Act is not an easy task. It requires combined efforts of state and local governments, along with those of the Commission. It is a duty that is shared by all levels of government, shaped by the dictates of section 253. In applying this statutory provision, we must remain mindful of the fundamental purpose of the Act: to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid, deployment of new telecommunications technologies."

Id. at 109-110. The tone taken seemed to suggest that the Commission recognizes that the authority of municipal officials to manage their rights-of-way is broad enough to sustain what Troy included in its Telecommunications ordinance. These are public policy -- not legal arguments – favoring restraint by local officials.

V. THE BARTON - STUPAK AMENDMENT

Professor Michael I. Meyerson of the University of Baltimore School of Law matter of factly concluded in a law review article, Michael I. Meyerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 Fed. Comm. J. L. 251, 275 (1997), that cable operators adding cable telecommunications service to their systems don't need to obtain local permission, to the extent required under state law, despite the so-called "Barton-Stupak amendment," section 253(c) of the 1996 Act.

In the article Professor Meyerson says that cities were stripped of authority by Section 621(b) of the U.S. Telecommunications Act of 1996 over cable provision of telecommunications service:

> The 1996 Act clears away much of the regulatory underbrush which kept cable operators from providing local telephone service. Most basically, the Act preempts much of the state and local regulation which governed the provision of non-cable service by cable operators.
>
> First, franchising authorities are barred from imposing a limit on the provision of telephone or telecommunications service by a cable operator. Second, franchising authorities are barred from requiring that cable operators obtain a franchise prior to offering telephone or telecommunications service.

Professor Meyerson takes a very skeptical look at the "Barton-Stupak" amendment which was intended to preserve the authority of local governments to manage the public rights-of-way and to require fair and reasonable compensation from companies providing telecommunications services on a competitively neutral and nondiscriminatory basis. Professor Meyerson objects, saying:

> "This saving clause is likely to be the source of much litigation. Not only is the Act silent as to what makes a fee 'reasonable,' there is also the question as to whether cable operators who already pay a franchise fee can be required to pay a second time for the same wire, just because it is carrying telecommunications information as well as video programming."

Id. at 266. [6]

However, it seems very apparent that Professor Meyerson failed to consider that Section 621(b) of the 1996 Act contains significant limiting language. Section 621(b) says, in pertinent part:

> (3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services:
>
> (i) such cable operator or affiliate shall not be required to obtain a franchise under *this title* for the provision of telecommunications services; and ii) the provisions of *this title* shall not apply to such cable operator or affiliate for the provision of telecommunications services." (Emphasis added.)

The limiting language referred to is the very specific reference to "this title," which is Title VI, that part of the Federal Communications law dealing specifically with municipal cable television franchises, The U.S. Cable Communications Policy Act of 1984, as amended. The Joint Statement says:

> Paragraph (1) of this subsection adds a new paragraph 3(A) to Section

---

[6]. The Commission's attention is called to the recent decision of the U. S. First Circuit Court of Appeals in *Cablevision of Boston, Inc., v. Public Improvement Commission of the City of Boston*, Case. No. 99-1222, (1st. Cir. Mass. August 25, 1999) which points out the split over proper interpretation of Section 253(c) contrasting the decisions in *GST Tucson Lightwave v. City of Tucson*, 950 F. Supp. 968, 971 (D. Ariz. 1996) and *TCG Detroit v. City of Dearborn*, 977 F. Supp. 836, 840 (E. D. Mich. 1997) with the Commission's own rulings in its *Suggested Guidelines for Ruling Under Section 253*, 63 Fed. Reg. 66,806, 66808 (1998), *In re Classic Telephone, Inc.* 11 F.C.C.R. 13,082 Paragraph 39 (October 1, 1996) and *TCI*, supra at Paragraph 108.

621(b) of the Communications Act, which sets forth the jurisdiction of and limitations on franchising authorities over cable operators engaged in the provision of telecommunications services. Specifically, a cable operator or an affiliate engaged the provision of telecommunications services is not required to obtain a franchise under Title VI of the Communications Act However, the Senate intends that telecommunications services provided by a cable company shall be subject to the authority of local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner and to charge fair and reasonable fees for its use."

Attorneys and others representing cities on cable television and telecommunications matters have consistently argued that Section 621(b) was only intended to exempt telecommunications services provided by cable operators from municipal franchising and regulation under Title VI, leaving local governments free to exercise whatever authority they have over telecommunications services under other federal, state and local law. As explained earlier, cities do not depend on the U.S. Cable Communications Policy Act of 1984 for their authority to require cable operators using the public rights-of-way to obtain municipal franchises. In Michigan, for example, cities obtain their authority from the state Constitution, which has been interpreted to require cable companies to obtain municipal franchises. The Act merely solidified local franchising authority over cable television systems in Michigan and most other states. Furthermore, the authority of cities over other companies providing telecommunications services in Michigan also derives from the same constitutional provision.

Section 254 of the Michigan Telecommunications Act of 1995, Mich. Comp. Laws Ann.§ 484.2254, requires companies offering telecommunications services to obtain a local authorization. Consequently, it seems beyond question that the 1996 Act merely preserves this authority using the tightly-drafted language of Section 621(b), making it clear to cities, townships and villages that they gain no authority over telecommunications services offered by cable operators solely by virtue of Title VI. Cities must look to other federal, state and local law for authority over cable provision of telecommunications services and, in Michigan, that authority exists under the Mich. Comp. Laws Ann. §484.2254.

Second, Professor Meyerson seems to have failed to thoroughly research the legislative history of rights-of-way provisions in the 1996 Telecommunications Act. The Barton-Stupak amendment was approved by an overwhelming vote on the floor of the U.S. House of Representatives early in the debate over the 1996 Act. It was offered by Michigan Congressman Bart Stupak who said he intended to safeguard municipal franchising and regulatory authority over rights-of-way. The powerful floor statement made by Representative Stupak when he introduced the bill clarifies the issues puzzling Professor Meyerson. Congressman Stupak said:

Our amendment also will strike language called 'Parity of Franchises'. I admit that on the surface parity language looks as if it just prohibits discrimination. But its effect is very different. In fact, the provision could be interpreted to force all local government to charge all users exactly the same

thing no matter when each franchise was granted, what burden each franchise places on the rights-of-way, or the nature of each provider's use of the rights-of-way. In many states, the local exchange company has a state granted franchise that is more than 100 years old that was granted in return for benefits such as universal service and comprehensive rate regulation instead of rights-of-way fees. This bill upsets the assumptions underlying these old franchises. The parity language in the bill will mean that if the local government can't change the state franchise all users of the rights-of-way might get to use it for free. It makes no sense to say that public rights-of-way are worth the same today as they were 100 years ago . . . .Local government must be able to distinguish between different telecommunication providers. They need the ability to make reasonable distinctions based on the nature of the occupancy and the burden each places on the rights-of-way . . . . Each provider should pay the true market value of the public property it plans to use in its business. Arbitrarily forcing a local government to charge the same price as it did decades ago to all providers seeking to use public property today ignores the market principle of pricing resources according to market value.

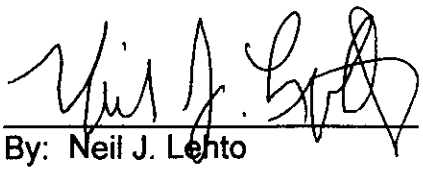
There could be no clearer statement of legislative intent regarding the ability of local governments to charge a fair and reasonable fee to cable television systems offering telecommunication services even if none can be charged to incumbent LECs offering telecommunications services under century-old statewide franchises.

CONCLUSION

The communities joining in filing these reply comments and, most assuredly, the hundreds of other cities, townships and villages doing so, remind the Commission that when companies digging in the public rights-of-way drill into a 42-water main knocking out service to 100,000 residents and 300 businesses, nobody affected calls their FCC Commissioner -- they call their mayors, city managers, DPW directors, council members, township and village officials.

Respectfully Submitted,

O'REILLY, RANCILIO, NITZ,
ANDREWS, TURNBULL & SCOTT, P.C.



By: Neil J. Lehto

September 1, 1999

Detroit News 6-10-1

Tap water unsafe to drink, thousands in Oakland told

Stores suffer lost sales

By Rene Wisely
and David Phillips
The Detroit News

AUBURN HILLS — Water, not money, is what makes businesses run, and large and small firms in northern Oakland County paid the price in lost sales and productivity Wednesday when the tap went dry.

■ Leonard Xerri, owner of New England Home Direct at Great Lakes Crossing mall, estimates the mall's closing cost him $1,000 in lost sales.

"I am sure we'll more than make up for it," Xerri said. "I look at it as a break."

■ General Motors Corp.'s Orion Township large car assembly plant, supported by a 2-million-gallon water tank, shut early Wednesday after authorities forced nearby seat maker Lear Corp. and other auto parts plants to close.

■ Kmart closed an Auburn Hills store with 150 employees on Jocelyn Road, but nearby Kmart stores reported a surge in bottled water sales. The Troy-based discounter donated 15,000 1-gallon water jugs to the American Red Cross.

■ More than 11,000 workers at DaimlerChrysler AG's Auburn Hills headquarters and technology center were scheduled to return to work today after a day off. The automaker was forced to buy 6,880 gallons of bottled water for employees.

■ Tom Sokolowski, assistant general manager at Bass Pro Shops Outdoor World at Great Lakes Crossing, said the store lost 12 percent of its weekly sales.

David Coates / The Detroit News

Ron Crowell, training safety officer for the Rochester Hills Fire Department, gives bottled water Wednesday to Sherry Courville at Adams High School.

James Borchuck / The Detroit News

Nursing assistant Audra Hyatt, rights, uses sterile bottled water to rinse off Dr. Joseph Mark as he scrubs up for surgery at Crittenton Hospital in Rochester.

Survival tips

■ People in Auburn Hills, Rochester Hills and Orion Township who have tap water should boil it before drinking it or cooking with it. Bring it to a full, rolling boil for five minutes to kill any harmful bacteria.

■ For those whose water is shut off, bottled water is available at Auburn Halls Fire Station No. 2, 2060 Opdyke Road, and Fire Station No. 3, 3253 Joslyn; Rochester Hills Fire Station No. 4, Walton east of Adams, and Adams High School, 3200 W. Tinken. Orion Township was working to bring in water as well; call (248) 391-0304 for more information.

■ **MORE COPING TIPS, PHOTOS** / PAGES 12-13A.

Residents must boil water until Saturday

By Gordon Trowbridge,
Mark Truby
and Mike Martindale
The Detroit News

AUBURN HILLS — Oakland County residents are warned not to drink tap water today without boiling it first, even if their faucets are flowing.

The water advisory will remain in effect until at least 6 p.m. Saturday to guard against harmful bacteria that might leach into pipes.

Workers on Wednesday toiled into the night to fix a fractured water main that disrupted the lives of more than 100,000 residents and workers and affected about 300 businesses in three Oakland County communities. The main broke Monday in Auburn Hills.

Repairs to the line were completed about midnight and Auburn Hills City Manager William Ross said at a Wednesday night press conference that full service should be restored early today. Water service first should be available for Auburn Hills customers, followed by those in Orion Township and then Rochester Hills, Ross said.

Thousands of homes in Auburn Hills, Rochester Hills and Orion Township had little or no water on Wednesday. People flocked to stores and city offices to pick up bottled water.

Betty Fitzhenry of Auburn Hills picked up two one-liter bottles of Aquafina from a city fire station on Wednesday. "You don't want to waste it. It's like gold until we get fixed up."

Please see WATER, Page 13A

WATER

Continued from Page 1A

Institutions from The Palace of Auburn Hills to Oakland University to DaimlerChrysler's U.S. headquarters sent workers home or were using bottled water.

As the water crisis entered its third day, life dissolved into major and minor crises for thousands of people, from those desperate to find water for sick loved ones to others frustrated by dirty cars and dry lawns.

At least four schools closed, along with an untold number of businesses that shut down on their own or were asked to by government officials.

Auburn Hills officials declared a state of emergency, worried about the danger of contamination and of fighting fires with little or no water.

The crises caused by the water main break "show what happens when modern life gets disturbed," City Manager Ross said.

Taylor firm blamed

Detroit's Department of Water and Sewerage has been working to repair the 3½-foot pipe ever since it was cracked about noon Monday by a contractor moving a phone line.

Ross and Detroit water official James Heath said the break on Squirrel Road near M-59 in Auburn Hills was the fault of a Taylor-based company doing work for MCI Worldcom.

Ross said Corby Energy Services was working without the proper permit when its drilling equipment broke the pipe, an accusation MCI denied. Ross hinted that lawsuits are likely against the company.

"If I were them, I would check my insurance," Ross said. "That puts them at extreme risk. I imagine the boys in vested suits will be coming along soon."

MCI spokeswoman Robin Halter said the Michigan Department of Transportation asked MCI to move a fiber-optic cable to make room for road construction. The company checked with utility officials and had proper permits, she said.

"We're certainly very regretful of the inconvenience to all the businesses and residents, many of whom are customers," Halter said.

A woman answering calls at Corby's Taylor office said the company had no comment.

The cracked line carries risks, public health experts said. Dangerous bacteria could enter the water system at the point of the break, and low water pressure throughout the system could allow contaminated groundwater to seep in.

Health officials said city water customers in Auburn Hills, Rochester Hills and Orion Township should boil water before drinking or cooking until further notice.

"Our concerns are dysentery, hepatitis A and other water-borne diseases," said Rosemarie Rowney, manager of the Health Office of the Oakland County Health Department.

The risk of illness is low, said Alice Gajewski, environmental health safety manager at Crittenton Hospital in Rochester. But people who drank unboiled water should watch for symptoms of illness and see a doctor if they have upset stomachs or dizziness.

Others help out

Amid the worry and inconvenience, residents and businesses pitched in to help.

Steven Fish, 4, helps ease the family water crisis as he loads a gallon onto his wagon Wednesday at the Rochester Adams High School distribution center.

Kmart, Meijer, Pepsi and WJBK (Channel 2) donated bottled water for cities to distribute. Gleaners Food Bank of Detroit gave 1,800 gallons of water, mirroring help Oakland County officials provided to Detroit during a January snowstorm.

Rochester Hills fire training officer Ron Crowell told a story of neighbor helping neighbor.

A woman who cares for a patient on a feeding tube came to Rochester Adams High School, one of the water-distribution sites, Wednesday morning looking for water after finding none at area stores. The school's delivery had yet to arrive, Crowell said, but Adams wrestling coach Pat Milkovich gave the woman two gallons stored in his car.

Rochester Hills Mayor Kenneth Snell said residents were handling the problem admirably as they waited to pick up donated water.

"People have been have been very cooperative and understanding," Snell said. "I haven't heard as much as a cross word yet, and some people have been waiting in line for water for some time."

Businesses take hit

Despite helping hands, the impact of the crisis was massive.

All 70,000 residents of Rochester Hills had no water or restricted supplies, as did all 20,000 residents of Auburn Hills and the thousands who work at the city's businesses. Orion Township Supervisor Colette Dywasuk said the line supplies water to about half the township's more than 20,000 people, with the rest supplied by wells.

At Crittenton Hospital, doctors were scrubbing for surgery using bottled water, and patients were asked to call ahead to see if scheduled treatments were still taking place. Area gas stations closed because of fear of fire.

Photos by David Coates / The Detroit News

Life in Rochester Hills gets a little less comfortable as Oakland County Sheriff's Deputy Greg Marohn goes house to house in the Cross Creek subdivision to tell residents to limit their use of water.

The county health office ordered restaurants without water closed. Those with water had to decide whether to close down or stay open and abide by a list of health restrictions.

At Lelli's of Auburn Hills, a white-tablecloth Italian restaurant on North Opdyke Road, frustrated owner Steve Lelli turned away customers at the door.

"We have water pressure, but it's contaminated," Lelli said. "We are losing a lot of money. I called the city, and they really can't give me a straight answer about when its

At Big Buck's Brew house on nearby Takata ees were unloading a f bags of ice and bottled day morning in an eff restaurant running. In Don Seimens of Toled finally find a restaur closed.

"I'm supposed to n and couldn't find a r where," Seimens sai drink the water. I gues beer."

Great Lakes close

At the Great Lakes stores had to turn a including one from Workers at the mall's Outdoor World handed to disappointed shopp

DaimlerChrysler bled to move meeti hotels and restaura automaker's Auburn H ters and technology ce and water pressure.

The complex, whic gallons of water a mon ed to reopen today.

By then, officials h would be flowing. But work would be done h day might have been

More than 30 w trucks from Detroit w

"They told us it mi a.m," said Bill Chesney Salvation Army, which wiches and drinks to

Detroit News Staff Wr Robinson, Nathan Coll Wisely and David Phil tributed to this report.

Free Press 6-10-99

Water main expected to be OK today

But city says firm didn't have permit

By ERIN LEE MARTIN, JOEL THURTELL AND CECIL ANGEL
FREE PRESS STAFF WRITERS

The company that popped a hole in a massive water main in Auburn Hills — nearly wiping out water service to four Oakland County communities and shuttering hundreds of area businesses — shouldn't have been working in the first place, Auburn Hills City Manager Bill Ross said Wednesday.

Corby Energy Services of Taylor, which was laying cable for MCI WorldCom Inc., hadn't obtained a city permit that would have allowed the company to drill legally, Ross said.

Corby declined comment, and MCI WorldCom insisted all the proper permits were applied for.

But Ross said Auburn Hills will present the findings of its investigation to the city attorney and pursue prosecution of the misdemeanor offense, as well as attempt to recoup the thousands of dollars in repair and cleanup expenses.

"I'm sure the City of Detroit will go after them for the costs of repairs," Ross said, noting that the huge, 42-inch water pipe is owned and operated by

Please see WATER, Page 8A

PATRICIA BECK/Detroit Free Press

Workers clear the way for replacement parts Wednesday as they repair the broken water main in Auburn Hills.

INSIDE

➤ Advice for handling the water crisis. 3A

WATER | Contractor questioned on permit

From Page 1A

Detroit's Department of Water and Sewerage.

He said some of the businesses that were forced to close, largely because there was insufficient amounts of water for proper fire protection, would probably sue to recover lost revenues as well.

Meanwhile, the punctured water main was expected back on tap this morning, but health officials cautioned thirsty people in northwest Oakland County to avoid water fountains and reach for bottled drinks.

Water pressure was expected to be normal today in Rochester Hills, Auburn Hills, Orion Township and Lake Orion, but officials say water users should continue boiling tap water until tests rule out contamination.

Ross said a boil order would remain in effect until at least 6 p.m. on Saturday.

"With the way the pipes work, there could be anything in there," said Thomas Dohr, Rochester Hills' director of public services.

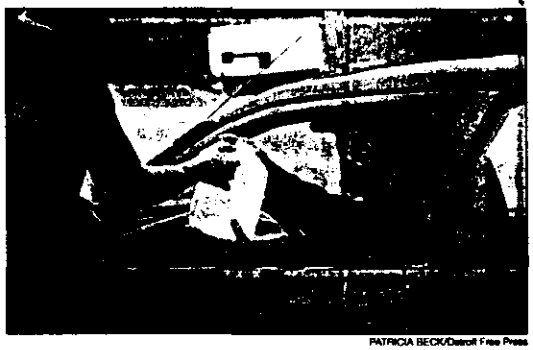
Great Lakes Crossing, DaimlerChrysler Corp. and other area businesses are expected to reopen this morning after giving thousands of employees an unexpected day off Wednesday. But it won't be business as usual.

Bottled water will be used for tasks such as scrubbing down doctors at Crittendon Hospital in Rochester Hills and washing produce at restaurants.

Ross said restaurants and other food-service businesses will have to work with the Oakland County Health Division to ensure there is no risk of contamination.

The Rochester Community Schools district plans to hand out a bottle to 13,000 students when classes resume this morning.

The hassle is a continuation of



PATRICIA BECK/Detroit Free Press

Rochester Hills residents such as Guna Chunduri got jugs of purified water from firefighter Eric Moravcik at Fire Station No. 4.

year by Huntington Woods-based Equity Holding Co. The suit claims Corby negligently conducted a water-boring project on land adjacent to property owned by Equity Holding in Ferndale.

It was too tall an order for some businesses Wednesday, but others braved the hassle and scooped up customers.

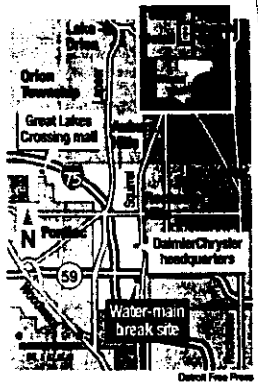
"We were abnormally busy today because a lot of places were closing," said George Strango, owner of George's Coney Island on Opdyke north of South Boulevard in Auburn Hills.

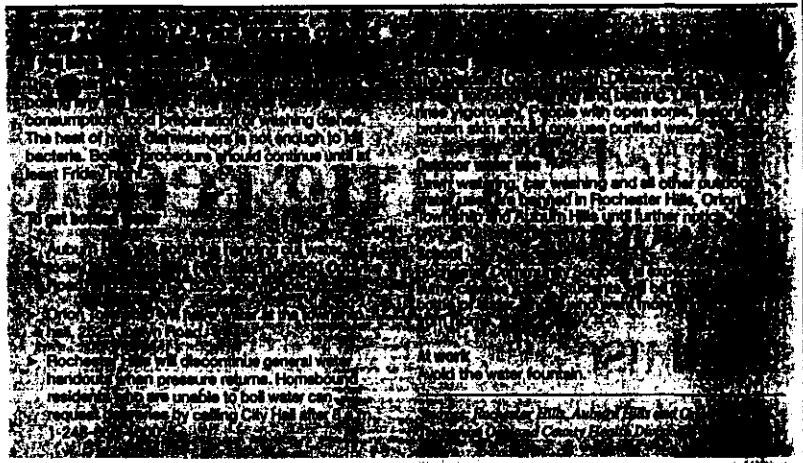
"I guess they had no water."

Staff writers Matt Helms, Daniel G. Fricker, Rachel Konrad and Hugh McDiarmid Jr. contributed to this report. ERIN LEE MARTIN *can be reached at 1-248-858-2606.* JOEL THURTELL *can be reached at 1-248-586-2609.*

AFFECTED COMMUNITIES

Lake Orion, Orion Township, Auburn Hills and Rochester Hills lost water pressure due to the Auburn Hills water-main break.





water shortage sent residents scrambling for clean water and forced hundreds of Oakland County businesses to close.

Eleven thousand employees at DaimlerChrysler were among the thousands of people told to stay home.

Although service is expected to resume today, Ross recommended that in addition to continuous boiling of drinking water, residents refrain from doing laundry for a few days because of contaminants and sediments that might have permeated the water lines. In addition, he said residents should check any water filters on appliances as they might clog with the extra water-borne sediments.

The main was damaged Monday morning when the drilling contractor bored into the pipe on the west side of Squirrel Road near M-59 in Auburn Hills.

James Heath of the Detroit Water and Sewerage Department said a Corby driller struck the bottom of the 42-inch-diameter line.

Although Ross said there was no permit for the work, Robin Halter, an MCI spokeswoman, said the company had applied for all the proper permits and regretted the accident. The permit allows drilling on the public right-of-way and requires filing a detailed plan of the job with the city.

A woman who answered the phone at Corby on Wednesday said: "I'm sorry, but we have no comment at this time," and hung up.

Wednesday morning, firefighters at Rochester Hills Fire Station No. 4 were handing out one gallon of drinking water per vehicle.

Meijer Inc. shipped in another 4,368 bottles from its Grand Rapids headquarters Wednesday afternoon. Kmart, WJBK-TV (Channel 2) and Pepsi chipped in in Auburn Hills.

Great Lakes Crossing security guards turned away customers Wednesday who came to the mall unaware of its closure.

Losses to the mall's 200 stores could not be tallied, officials said.

Heath, assistant director of operations for the Detroit Water and Sewerage Department, said Wednesday night that repair work was on schedule.

Heath said Corby knew where the pipe ran, "but there's no way to know how deep it is." The auger shaved across the pipe bottom, 11 feet underground, he said.

It isn't the first time the company has been on the wrong side of an accident.

Corby Energy Services is the target of a lawsuit, pending in 43rd District Court and filed last

5

t

ns

The Detroit News
s **Scotch**

ssage

t are in their
ys. "Whether
happened at
gives us a
xamine that
l the right
re that our
safest place

ield parents
erns for their
especially in
w "copy-cat
" last spring.
l way to help
nts feel wel-
hools," says
parent Kitty
anners are a
oming sign
we can't do
kids and our

Student of the week
Stacie Guerre
East Middle
School

Who she is: Stac
so is a sixth-grad
at East Middle Sc
Farmington Hills.

Her background: D
ter of Mario and
Guerreso, she is
youngest of five

Why she was hon
Stacie was awa
Nicholas Green D
guished Student
for the 1998-99 s
year on Aug. 26 in
ing. The award rec
one student from
state once a year.
award was start
parents whose 7-y
son was killed in a
by shooting while
family was visiting
1994. The award is
on academic ac
ment and citizen
is open to studen
third to sixth grad

She also starred
Keller in a prod
The Miracle Wor
inside the Meado
Theatre in Roche
Hills. Stacie also
with and starred
efit concert for
Motor Co. worke
were burned in th
sion at the Roug
plex in Dearborn o
1. She enjoys wor
with younger chi
especially those
handicaps. A vo
actress, she pa
in vocal, dance a
ing lessons and
tioned for the to
company of *Annie*

Costs rise in water shutdown

Auburn Hills plans to ask MCI, contractor to pay for business, residential damage.

By Gordon Trowbridge
The Detroit News

AUBURN HILLS — City officials plan to seek thousands of dollars in damages from the companies they say are responsible for a June water main break that left thousands of people and hundreds of businesses without full water service.

City Manager William Ross said a police investigation found that Corby Energy Services, a Taylor contractor, and MCI Worldcom failed to get proper permits for construction work to move underground telephone lines.

Corby was employed by MCI, which had to move the lines to make way for new M-59 exit ramps. On June 7, an underground drill punctured a 42-inch Detroit Water and Sewerage water main, leaving people in Auburn Hills, Rochester Hills and Orion Township with little or no water.

Hundreds of businesses shut down or were ordered to close. Water customers had to boil tap water for nearly a week to guard against contamination.

MCI spokeswoman Robin Halter said the company cannot comment on the water main break, citing pending lawsuits filed by residents who were without water.

Ross said it's likely within the next two weeks that the city will ask MCI and Corby to reimburse the city for staff overtime and other costs of the water crisis. "The public needs to be made whole," he said.

If the companies or their insurance companies don't agree to pay, the city probably will sue, he said.

Ross said the city still is gathering information on its costs, but it's likely to be in the thousands of dollars.

That's just a slice of the economic and human toll of the five-day crisis.

Businesses from mom-and-pop shops to DaimlerChrysler's U.S. headquarters and Great Lakes Crossing mall had to close, along with schools and Oakland University. Oakland County officials eventually gave up counting the costs.

Debate over who was to blame for breaking the water main started before crews had finished their repairs.

Ross said police investigators confirmed what he and other city officials said in June: Corby and MCI didn't get a city permit for the work, despite the fact that the digging crossed into city right-of-way along Squirrel Road.

At the time, representatives of MCI and Corby said the company had gotten permits from the state Department of Transportation, covering any need for government approval.

A Corby spokesman also had said Detroit water workers had not marked the path of the water main, as required by the state's system of precautions to avoid such accidents. A Detroit official said in June that workers had in fact marked the path.

Ross said he did not know if the pipe's path had been marked. But Detroit water officials told police they had asked Corby to notify them when they would start digging near the main, so they could be on the site, Ross said.

RIGHT-OF-WAY AGREEMENT

THIS AGREEMENT is entered into this 6 day of OCTOBER, 1998, by and between the City of Sterling Heights, a Michigan Municipal corporation ("City") and Metropolitan Fiber Systems of Detroit, Inc., a Delaware corporation, ("MFS").

PREMISES

A. MFS installed certain fiber optic cable and associated facilities ("Cable") within the City right-of-way along the east side of Van Dyke Avenue from Fourteen-Mile Road to Seventeen-Mile Road, along the north side of Seventeen-Mile Road west to Mound Road, along the west side and center median of Mound Road to Fourteen-Mile Road and along the north side of Fourteen-Mile to Dequindre as set forth in **Exhibit "A"** beginning in July, 1995.

B. MFS is a public utility authorized to provide telecommunications services and access public ways by the laws of the State of Michigan.

ACCORDINGLY, THE PARTIES AGREE AS FOLLOWS:

1. Permission Granted. MFS may operate and maintain the Cable in the public right-of-way as set forth in Exhibit "A" and expand its telecommunications network subject to the terms and conditions of this Agreement and the further exercise of the City's regulatory power protecting the public health, safety and welfare, for a term of two (2) years commencing on the effective date of 10-6, 1998. This Agreement is revocable by the City Council at its pleasure as required by §15.04 of the City Charter and also pursuant to Section 12 hereof.

2. Payments by MFS.

(a) For the reason that the streets, highways and public rights-of-way to be used by MFS in the installation, maintenance, and operation of its Cable within the boundaries of the City are valuable public properties, acquired and maintained by the City at great expenses to its taxpayers, and that the grant to MFS of the use of said streets, highways and public rights-of-way is a valuable property right without which MFS would be required to invest substantial capital in right-of-way costs and acquisitions, MFS agrees to pay to the City a one-time acceptance fee of $10,000 and an annual fee of $500 subject to adjustment by the City Council every three years as set forth in §48A-10(a)(2) of the City Code.

(b) Payment of the $10,500 shall be made immediately. In succeeding years, MFS shall forward by check or money order an amount equal to the annual payment by June 30th for the following year. In the event any annual payment is made after close of business on the

date due, MFS shall pay a late payment fee of $100. Acceptance of money under this Section shall not in any way limit or inhibit any of the privileges or rights of the City. Permit fees shall be in addition to any other tax, charge, fee, or payment due the City by MFS.

3. Permitted Uses. MFS may not use the Cable to provide cable television service as defined by the U.S. Cable Communication Policy Act of 1984.

4. Representations. MFS makes the following express representations:

(a) The City has the right to adopt ordinances protecting the public health, safety and welfare affecting MFS during the term of the permit. It further recognizes and agrees that the City shall in no way be bound to renew or extend the permit at the end of the permit term and that MFS may be deemed a trespasser at expiration.

(b) MFS shall have no recourse whatsoever against the City for any loss, cost, expense or damage arising out of the failure of City to have the authority to grant all or any part of a permit. MFS relied on its own investigation and understanding of the power and authority of the City in seeking and accepting this permit.

(c) MFS has not been induced to accept this permit by any understanding or promise or other statement, whether verbal or written, by or on behalf of City or by any other third person concerning any term or condition of a permit not expressed in this permit.

(d) MFS further acknowledges by the acceptance of a permit that it has carefully read its terms and conditions, and does accept all of the risks of the meaning of such terms and conditions and agrees that in the event of any ambiguity or in the event of any dispute over the meaning the same shall be construed strictly against MFS and in favor of City.

5. Conflicts/Legal Developments. However, if any such state or federal law or regulation shall require MFS to perform any service, or shall permit MFS to perform any service, or shall prohibit MFS from performing any service, in conflict with the terms of the permit or of any law or regulation of the City, then as soon as possible, MFS shall notify the City of the point of conflict believed to exist between such regulation or law and the laws and regulations of the City or the permit.

(a) MFS and the City acknowledge their differences of opinion regarding the conditions and requirements that a municipality may impose upon telecommunications providers for the use of public right-of-ways.

(b) By entering into this Agreement, the City is not conceding, waiving or relinquishing its position that telecommunications providers must obtain local franchises, and must pay a percentage of gross revenues or fair market value for the use of the right-of-ways. Conversely, MFS is not conceding, waiving, or relinquishing its position that the City must grant MFS a telecommunication permit for use of the right-of-ways and is only entitled to payment based on the fixed and variable costs of managing the right-of-ways.

(c) If any federal or state court of law, or any administrative agency of competent jurisdiction, makes a determination, ruling, regulation or decree applicable to telecommunications providers that they are subject to local franchises and/or establish a method of determining fixed and variable costs or of computing financial requirements for the use of right-of-ways other than or beyond fixed and variable costs, then MFS shall be deemed to have obtained a franchise from the City, together with all of the rights and liabilities thereto and/or shall be liable to pay, the compensation allowed by law based on the computation or formula established by the court or agency from the effective date of such determination, ruling regulation or decree.

(d) In the event of an adjudication or ruling subjecting telecommunications providers to franchise fees or other payment computation, then the City Treasurer shall hold on behalf of MFS the difference between the annual fee of $500 and the newly required additional amounts, from the date of the initial adjudication, until the exhaustion of the final appeal period. Such an amount shall be retained by the City upon exhaustion of that final appeal period. In the event the final appellate decision determines that such amount is not due and owing, the City shall return such retained monies with interest, as applicable, no later than 30 days following such decision.

6. Severability. Subject to Section 5 above, if any provision of the permit is held by any court of competent jurisdiction to be invalid as conflicting with any federal or state law, rule or regulation now or later in effect, or is held by such court to be modified in any way in order to conform to the requirements of any law, rule or regulation, the provision may be considered a separate, distinct and independent part of the permit, and such holding shall not affect the validity and enforceability of all other provisions if the City so determines. In the event that such law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed, so that the provision which had been held invalid or modified is no longer in conflict with the law, rules or regulations said provision shall return to full force and effect and shall be binding on the parties.

7. Right to Modify. If the parties determine that a material provision of a permit is affected by action of a court or of the state or federal government, the parties agree to modify any of the provisions to such reasonable extent as may be necessary to carry out the full intent and purpose of the permit.

8. Conditions of Street Occupancy. MFS may not commence construction in any street, highway or public right-of-way without obtaining further construction permits as required under Chapter 48 of the City Code, as amended, which apply to the installation of Cables and related equipment within the public rights-of-way.

9. Technical and Construction Standards. MFS shall maintain its Cable in a manner consistent and in compliance with all applicable laws, ordinances, construction standards, governmental requirements, and technical standards established by the Federal Communications Commission or state agency. In any event, the Cable shall not endanger or interfere with the safety of persons or property within the City or other areas where MFS may have equipment located. All working facilities, conditions, and procedures, used or occurring during construction

of the Cable shall comply with the standards of the Occupational Safety and Health Administration. Maintenance of a Cable shall be performed in an orderly and workmanlike manner, and in close coordination with public and private utilities serving the City following accepted industry construction procedures and practices and working through existing committees and organizations. MFS shall join the Miss Dig program.

10. Maps, Records, and Reports. MFS shall provide the City with current maps of its existing installations in a standardized format for use with the City's G.I.S. data system unless no changes have occurred in the previously submitted map. MFS shall allow the City to make inspections of any of MFS's facilities and equipment within the City's boundaries at any time upon three (3) days prior written notice or, in case of emergency, upon demand without notice.

11. Transfer of Rights.

(a) Neither this permit nor any part or portion of interest in this permit may be sold, transferred or assigned without the prior consent of the City which it shall not unreasonably withhold or delay. Notwithstanding the foregoing, MFS may sell, assign or transfer all or a portion of its interest in this permit to a wholly-owned subsidiary. The occurrence of any event which constitutes either an act of bankruptcy by MFS or placement of MFS into receivership, the issuance of any order to MFS or any of its stockholders by a government agency or court of competent jurisdiction to divest any interest related to the Cable or the entry of any judgment against MFS which, in the opinion of the City, impairs MFS's credits or MFS's failure to meet its financial obligations on a continuing basis, shall be deemed an unauthorized transfer and assignment under the provisions of this subsection and shall:

(1) Be deemed a material breach and default of the permit; and

(2) Subject MFS to all penalties and remedies prescribed in the permit and to all other remedies, legal and equitable, which are available to the City.

(b) The occurrence of an unauthorized transfer or assignment shall at the option of the City, constitute a material breach of the permit which may result in termination under Section 12. MFS shall notify the City of any occurrence which constitutes an unauthorized transfer and of the entry of any judgment against it within twenty-four (24) hours of knowledge of such occurrence.

12. Termination.

(a) In addition to all other rights and powers reserved or pertaining to the City, the City reserves as an additional and as a separate and distinct remedy, the right to terminate a permit and all rights and privileges of MFS in any of the following events or for any of the following reasons:

(1) MFS fails after receipt of thirty (30) days prior written notice to comply with any of the provisions of the permit or has, by act or omission, violated any term or condition; or

(2) MFS becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt; or

(3) All or part of MFS's facilities are sold under an instrument to secure a debt and are not redeemed by MFS within ninety (90) days from such sale; or

(4) MFS is found by a court of competent jurisdiction to have committed fraud or deceit in its conduct or relations with the City under the permit; or

(5) City condemns all of the property of MFS within the City by the lawful exercise of eminent domain; or

(6) MFS abandons the Cable or fails to seek renewal of its permit.

(7) No termination, except for reason of condemnation, shall be effective unless or until the City shall have adopted a resolution setting forth the reason for the revocation and the effective date, which resolution shall not be adopted without sixty (60) days prior notice to MFS and an opportunity for MFS to be heard on the proposed resolution.

13. Removal

(a) Upon expiration the permit, if the permit is not renewed and if neither the City nor an assignee purchases the Cable, MFS may remove any underground Cable from the streets which has been installed in such a manner that it can be removed without trenching or other opening of the streets along the extension of Cable to be removed. MFS shall not remove any underground Cable or conduit which requires trenching or other opening of the streets along the extension of Cable to be removed. MFS shall remove, at its sole cost and expense, any underground Cable or conduit by trenching or opening of the streets along the extension or otherwise which is ordered to be removed by the City based upon a determination, in the sole discretion of the City, that removal is required in order to eliminate or prevent a hazardous condition or promote future utilization of the streets for public purposes. Any order by the City to remove Cable or conduit shall be mailed to MFS not later than sixty (60) calendar days following the date of expiration of the permit. MFS shall file written notice with the City Clerk not later than thirty (30) calendar days following the date of expiration or termination of the permit of its intention to remove Cable and a schedule for removal by location. The schedule and timing of removal shall be subject to approval and regulation by the City. Removal shall be completed not later than twelve (12) months following the date of expiration of the permit.

Underground Cable and conduit in the streets and public rights-of-way which is not removed shall be deemed abandoned and title shall be vested in the City and MFS shall have no further liability.

(b) Upon expiration, termination or revocation of a permit, if the permit is not renewed and if neither the City nor an assignee purchase the Cable, MFS, at its sole expense, shall, unless relieved of the obligation by the City, remove, from the streets all above ground elements of the Cable, including but not limited to pedestal mounted terminal boxes, and lines attached to or suspended from poles, which are not acquired by the City or its assignee. If the City consents to abandonment of MFS facilities in place, MFS shall transfer title to the City and, upon delivery, have no further liability.

(c) MFS shall apply for and obtain such encroachment permits, licenses, authorizations or other approvals and pay such fees and deposit such security as required by applicable law or ordinance of the City, shall conduct and complete the work of removal in compliance with all such applicable law or ordinances, and shall restore the streets and public rights-of-way to the same condition they were in before the work of removal commenced. The work of removal shall be completed not later than twelve (12) months following expiration, termination or revocation of a permit.

14. Insurance. MFS and any contractor hired by MFS to install, maintain, improve, restore or remove Cable within the City right-of-way shall not commence work under this agreement until they have obtained the insurance required within this section. All insurance coverage shall be with insurance carriers acceptable to the City. If any insurance is written with a deductible or self-insured retention, MFS or contractor shall be solely responsible for said deductible or self-insured retention. The purchase of insurance and the furnishing of a certificate of insurance shall not be a satisfaction of MFS's indemnification of the City. MFS is responsible to meet all MIOSA requirements for on-the-job safety. MFS and any contractor hired by MFS shall procure and maintain during the life of this contract the following:

(a) Workers Compensation Insurance in accordance with all applicable statutes of the State of Michigan. Coverage shall include Employers Liability Coverage.

(b) Commercial General Liability Insurance on an "occurrence" basis with limits of liability not less than $2,000,000 per occurrence and aggregate combined single limit, Personal Injury, Bodily Injury and $1,000,000 for Property Damage. Coverage shall include the following extensions:

1. Contractual Liability
2. Products and Completed Operations
3. Independent Contractors Coverage
4. Broad Form General Liability Extensions or equivalent
5. Coverage for X, C and U Hazards.

(c) Motor Vehicle Liability Coverage, including Michigan No-Fault Coverage for all vehicles used in the performance of the contract. Limits of Liability shall not be less than $1,000,000 per occurrence combined single limit Bodily Injury and Property Damage.

(d) Additional Insured. Commercial General Liability Insurance as described above shall include an endorsement stating the following shall be an additional insured:

> "The City of Sterling Heights, including all elected and appointed officials, boards, commissions, officers and employees"

(e) Cancellation Notice. Workers' Compensation Insurance, Commercial General Liability Insurance, and Motor Vehicle Liability Insurance as described above shall include an endorsement stating that thirty (30) days advance written notice of cancellation, non-renewal, reduction and/or material change shall be sent to:

> City of Sterling Heights
> Mark Carufel, Risk Manager
> 40555 Utica Road
> P.O. Box 8009
> Sterling Heights, Michigan 48311-8009

15. Proof of Insurance. If so requested by the City, MFS and any contractors hired by MFS shall within thirty (30) days of such request supply a certificate of the insurance policy of any of the insurance coverage required under this agreement.

16. Indemnity/Hold Harmless Agreement. To the fullest extent permitted by law, MFS agrees to indemnify and hold the City, its elected and appointed officials, employees, and volunteers and others working in behalf of the City, harmless from and against all loss, cost, expense, damage, liability or claims, whether groundless or not, arising out of bodily injury, sickness or disease (including death resulting at any time therefrom) which may be sustained or claimed by any person or persons, or the damage or destruction of any property, including the loss of use, based on any act or omission, negligent or otherwise, of MFS or anyone acting on its behalf in connection with or incident to this agreement, except that MFS shall not be responsible to the City on indemnity for damages caused by or resulting from the City's sole negligence or intentional misconduct. MFS shall, at its own cost and expense, defend any such claim and any suit, action, or proceeding which may be commenced, and MFS shall pay any and all judgments which may be recovered in any suit, action or proceeding, and any and all expense, including but not limited to costs, attorney's fees and settlement expenses which may be incurred. The City agrees to give MFS prompt notice of any such claims which MFS may defend with counsel of its own choosing. No claims may be settled or compromised without the consent of MFS.

17. Notices. All notices required by this Agreement shall be deemed given by depositing them in the United States Mail, first class, and addressed to:

City Manager
City of Sterling Heights
40555 Utica Road
P. O. Box 8009
Sterling Heights, MI 48311-8009

Metropolitan Fiber Systems of Detroit, Inc.
c/o World Com, Inc.
Purchasing and Contracts
6929 N. Lakewood Avenue
Tulsa, OK 74117
ATTN: Steven Harper, Contract Administrator

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

~~ATTEST:~~ Witness

By: Kimberly Fivelson

Its: Paralegal

METROPOLITAN FIBER SYSTEMS OF DETROIT, INC., a Michigan corporation

By: [signature]

Its: VP Stategic Planning

Date: August 31, 1998

~~ATTEST~~: Witness

By: Janice Mulligan
Janice Mulligan

By: Elaine Lukaszek
Elaine Lukaszek

CITY OF STERLING HEIGHTS, a Michigan Municipal corporation

By: Richard J. Notte
Richard J. Notte

Its Mayor

By: Walter C. Blessed
Walter C. Blessed

Its: City Clerk

Date: 10-6-98

APPROVED AS TO FORM
Paul J. Caro, Esq.

EXHIBIT A-1

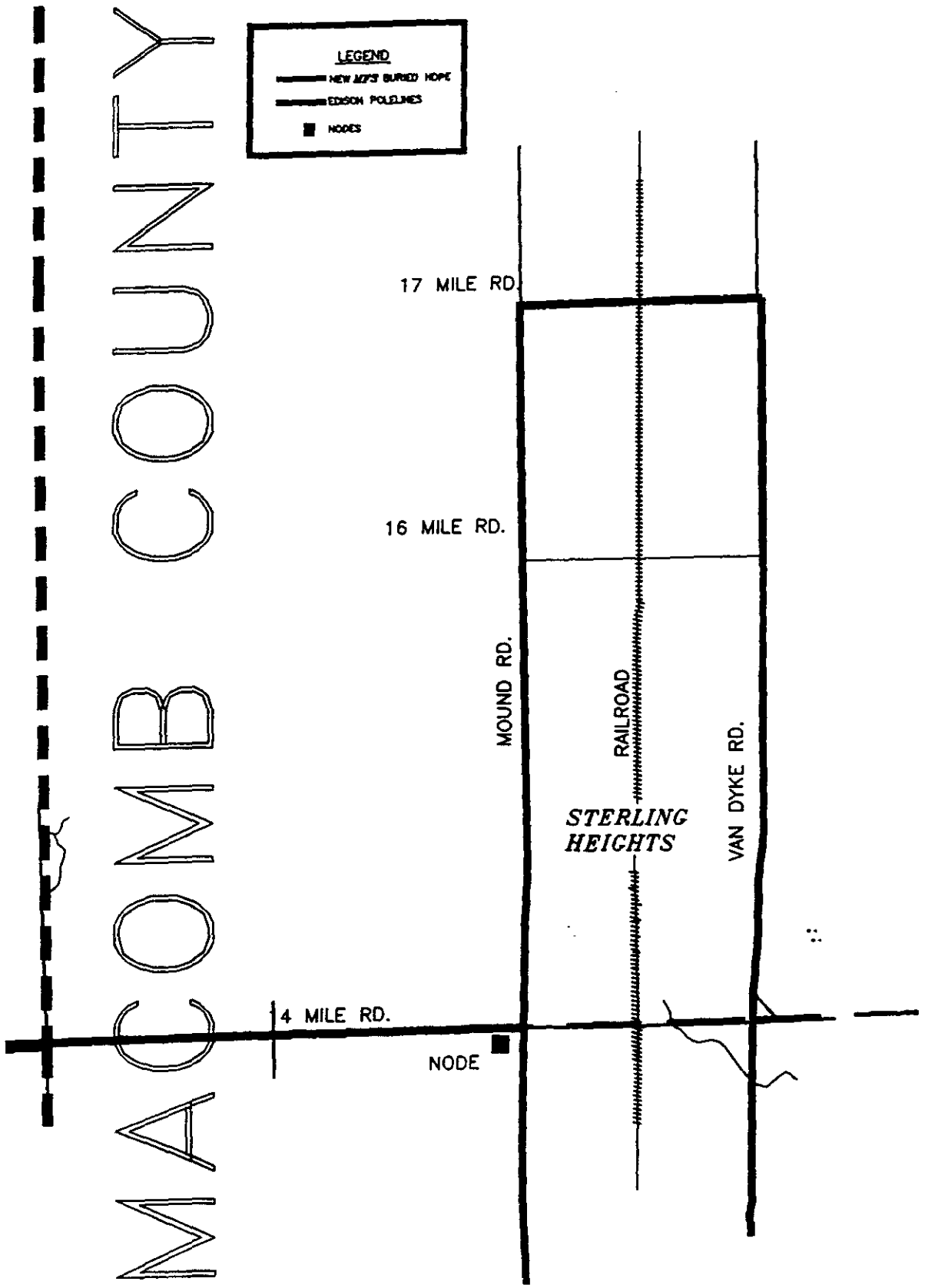
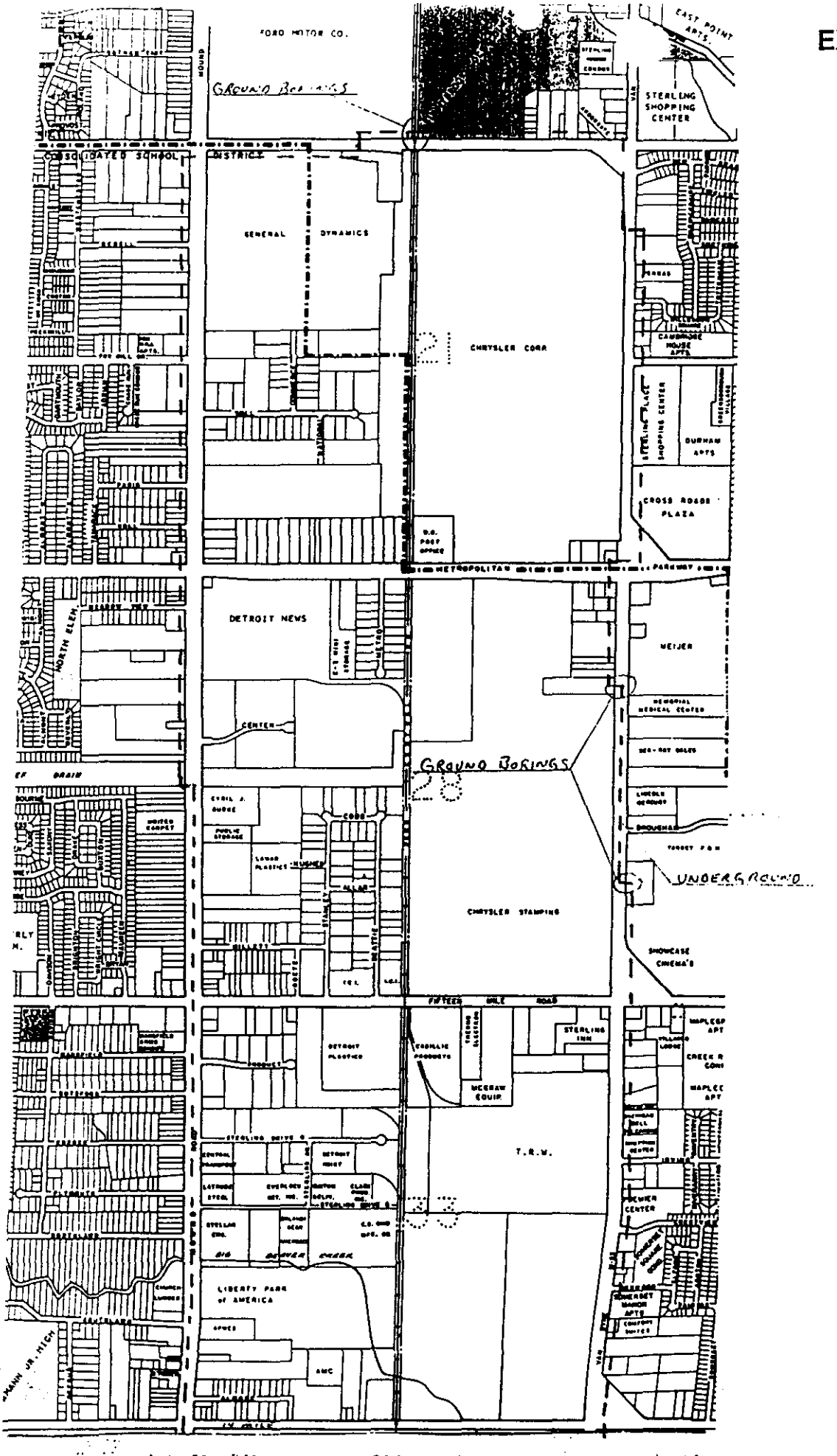

MACOMB COUNTY
LEGEND
NEW MP'S BURIED HDPE
EDISON POLELINES
NODES
17 MILE RD.
16 MILE RD.
MOUND RD.
RAILROAD
VAN DYKE RD.
STERLING HEIGHTS
4 MILE RD.
NODE

EXHIBIT A-2


FORD MOTOR CO.
GROUND BORINGS
STERLING SHOPPING CENTER
CONSOLIDATED SCHOOL DISTRICT
GENERAL DYNAMICS
CHRYSLER CORP
DURHAM APTS
CROSS ROADS PLAZA
U.S. POST OFFICE
METROPOLITAN PARKWAY
DETROIT NEWS
MEIJER
GROUND BORINGS
UNDERGROUND
CHRYSLER STAMPING
SHOWCASE CINEMA'S
FIFTEEN MILE ROAD
T.R.W.
LIBERTY PARK of AMERICA
UNLESS SPECIFIED ALL CABLE